Filed 10/27/16 P. v. Herrera CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO HERRERA, Defendant and Appellant.	B260095 (Los Angeles County Super. Ct. No. VA120705)
In re ROBERTO HERERRA, on Habeas Corpus.	B267086

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul Sahagun, Judge. Judgment affirmed as modified. Habeas corpus petition denied.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Roberto Herrera was convicted of the first degree murder of Daniel Villanueva (Pen. Code, § 187, subd. (a); count one)[1] and shooting at an occupied motor vehicle (§ 246; count two). The jury also found true the firearm use enhancements as to both counts (§ 12022.53, subds. (b), (c) & (d)). Defendant was sentenced to an aggregate term of 51 years to life in state prison on count one, consisting of 25 years to life for the murder conviction, plus 25 years to life for the firearm use enhancement, plus one year for a section 667.5, subdivision (b) prison prior. He was sentenced to 32 years to life on count two, consisting of the upper term of seven years for the section 246 conviction, plus 25 years to life for the firearm use enhancement. The trial court stayed the sentence on count two under section 654.

On appeal, defendant contends (1) the trial court erred in failing to instruct sua sponte on voluntary manslaughter, (2) the prosecutor committed prejudicial misconduct by misstating the law on premeditation and deliberation in closing argument, and (3) some of the jury's true findings on the firearm use enhancements were improper as to count two. Defendant also filed a petition for writ of habeas corpus, which we ordered

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[1] All further references are to the Penal Code unless otherwise stated.

considered concurrently with this appeal, and as to which we have directed and received an informal response from the Attorney General and a reply from defendant. In his petition, defendant contends his trial counsel was ineffective in failing to object to the prosecutor's misstatement of law.

The Attorney General concedes, and we agree, that the lesser included firearm use enhancements do not apply to count two. The proper remedy is to vacate those findings. We otherwise affirm the judgment and deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

On April 28, 2011, at approximately 8:00 p.m., Villanueva drove to La Alameda Shopping Plaza with his girlfriend, Amanda Avalos, and their one-year-old son. Avalos testified that Villanueva turned on his blinker in the parking lot while he waited for a van to pull out of a parking space. After the van pulled out, a pick-up truck drove into the space for which Villanueva was waiting. Defendant exited the truck with a woman, and Villanueva got out of his car. Villanueva said to defendant, " 'Didn't you see me? I had my signal on. I had been waiting for that parking space.' " Defendant was "upset [and] [a]ggressive," and responded, " 'What are you going to do about it?' " Villanueva got back in his car and drove home. He dropped off Avalos and their son and said, " 'I'll be back.' " That was the last time they saw him.

Eddie Pech, head of security at La Alameda Shopping Plaza, testified that on April 28, 2011, at approximately 8:00 p.m., he was walking in the mall's parking lot when he heard two men arguing over a parking spot. He approached them and saw Villanueva arguing with another man. Pech observed that both men were "medium angry," and he felt the argument

"was going to escalate [into] something else." However, Villanueva then got back into his car with Avalos and drove away. As they were leaving, Pech heard the other man say, " 'Te voy a quebrar,' " which, according to the court's Spanish-language interpreter, could mean, "I'm going to bust you up" or "I'm going to break you up."

At approximately 8:20 p.m., Nakia O'Neal was standing in the parking lot of La Alameda Shopping Plaza smoking a cigarette. O'Neal testified that he saw Villanueva and defendant drive up separately. The two men got out of their vehicles and walked behind a dumpster. O'Neal heard them fighting for "15, 20 seconds" and then heard someone say, " 'Estubo' " which, according to the court's Spanish-language interpreter, could mean "To meet," "That's the end. It's final. That's it." Villanueva and defendant walked out of the dumpster enclosure, spoke to each other, and shook hands. Defendant had a cut on his face.

Villanueva then got in his car, put his seat belt on, and put the car in reverse. Meanwhile, defendant went to his truck, grabbed a semi-automatic handgun, and walked over to Villanueva's car. As Villanueva's car was reversing, defendant fired five shots that went through the driver's side window and the windshield, hitting Villanueva. Defendant then got back in his truck and drove off. O'Neal approached Villanueva and told him, " 'Hang on. The ambulance is on the way.' " Villanueva died before help arrived.

A criminalist analyzed blood collected from the dumpster area and from Villanueva's shirt. She testified that DNA in those blood samples matched defendant's.

Defendant's girlfriend and four children lived in an apartment with the girlfriend's mother. A neighbor testified

that, on July 24, 2011, he saw defendant leave the apartment with his family and some suitcases. One of the children told the neighbor they were going to Mexico. When the girlfriend's mother was interviewed later by police, she said defendant went to Mexico because "the police were looking for [defendant] . . . [with] regard[] to a murder."

On June 25, 2012, the police received information that defendant was staying at an apartment in Downey, California. A police officer testified that the police surrounded the apartment and ordered defendant to come out. Defendant exited the apartment, extended his middle finger to the police and told them to " 'fuck off.' " He then re-entered the apartment. Twenty minutes later, he surrendered to the police.

Defendant testified he did not shoot Villanueva. He said that at approximately 8:00 p.m. on April 28, 2011, he and his girlfriend were in the parking lot of La Alameda Shopping Plaza. He had just parked his pick-up truck when Villanueva approached him and said he had been waiting for that parking space. Villanueva was "aggressive," asked what neighborhood defendant was from, and said this "was his territory." Defendant "tried to apologize to him" and "calm him down," but Villanueva was "furious." Villanueva told him "walk away before I bust you up," and defendant walked away.

Defendant and his girlfriend went into the mall, but then two minutes later defendant returned to his truck. As defendant was walking toward his truck, Villanueva "jumped up between the cars" and "surprised [defendant]." Villanueva said "now what?" and defendant "tried to calm him down again." Villanueva then hit defendant, after which the two men "fought" for "not more than two minutes." Defendant was injured "on the

lip" and "bled by [his] nose." Villanueva said "it was his territory" and yelled out the name of his gang, "Florencia." Villanueva "made, like, a sign to a white car . . . like . . . they were with him." After that, Villanueva left.

Defendant testified that the fight lasted "not more than two minutes." After the fight, he "cleaned off the blood that [he] had, and . . . was telling [his] girlfriend just calm down. Nothing happened." He went back into the mall and "bought . . . food to take out. [He] wasn't comfortable anymore." While walking back to his truck with his girlfriend, he saw "a commotion in the back part area" and what appeared to be Villanueva's car nearby. Subsequently, he testified to a different version of events, namely that he did not return to the mall after the fight, but got into his truck and, as he was driving away, "saw [a] commotion" and heard a sound "like gunshots." Defendant further testified that he never went into the dumpster enclosure and that someone "might" have planted his blood there.

CONTENTIONS

Defendant contends (1) the trial court erred in failing to instruct sua sponte on voluntary manslaughter, (2) the prosecutor committed prejudicial misconduct by misstating the law on premeditation and deliberation in closing argument, and his trial counsel was ineffective in failing to object to the prosecutor's misstatement of law, and (3) the jury's true findings on the lesser included firearm use enhancements under section 12022.53, subdivision (b) and (c) were improper as to count two.[2]

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[2] Defendant's motion for judicial notice in the habeas corpus matter, to the extent that it requests this court to take judicial notice of pleadings filed in connection with defendant's direct appeal, is unnecessary as we have issued an order that the

DISCUSSION

1. *Voluntary Manslaughter*

Defendant contends the trial court was obliged to instruct the jury on the lesser included offense of voluntary manslaughter because there was substantial evidence he acted in the heat of passion when he shot Villanueva. For the reasons that follow, we do not agree.

" '[A] defendant has a constitutional right to have the jury determine every material issue presented by the evidence . . . .' [Citation.] ' "To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." ' [Citation.] Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.' [Citation.] ' "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." ' [Citation.] [¶] On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense. [Citation.]

"Voluntary manslaughter is a lesser included offense of murder. [Citation.] One form of the offense is defined as the unlawful killing of a human being without malice aforethought 'upon a sudden quarrel or heat of passion.' (§ 192, subd. (a).)"

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habeas matter be heard concurrently with the appeal. The balance of defendant's motion, which requests us to take judicial notice of facts that are not pertinent to our review, is denied.

(*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) " ' "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' " [Citation.]' [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

" 'The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.]' " (*People v. Cole*, *supra*, 33 Cal.4th at p. 1215.) "The defendant must actually, subjectively, kill under the heat of passion[,] [citation] [b]ut the circumstances giving rise to the heat of passion are also viewed objectively." (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 584.)

"The subjective element requires that the actor be under the actual influence of a strong passion at the time of the homicide. . . . ' "[P]assion" need not mean "rage" or "anger" but may be any "[v]iolent, intense, high-wrought or enthusiastic emotion" . . . . [Citation.]' [Citation.]" (*People v. Wickersham* (1982) 32 Cal.3d 307, 327.) The objective element requires that the heat of passion " ' "would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances . . . ." [Citation.]' [Citations.]" (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 584.) "To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.' [Citation.]" (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 326.)

The record in the present case does not contain substantial evidence to support a voluntary manslaughter instruction on the

theory that defendant killed Villanueva in the heat of passion. Both Avalos and Pech testified that defendant exhibited anger when he initially argued with Villanueva—Avalos said defendant was "upset" and "aggressive," and Pech said defendant was "medium angry" and said, "I'm going to bust or break you up." Defendant himself testified that he was calm throughout the initial encounter with Villanueva, he told Villanueva to calm down, and he walked away to avoid any problems with Villanueva. However, even evidence that defendant was "upset," "aggressive," and "medium angry" when he first encountered Villanueva and argued over a parking spot does not rise to the level of the " ' "[v]iolent, intense, high-wrought or enthusiastic emotion" ' " required by " ' "heat of passion." ' " (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 327; c.f., *People v. Breverman* (1998) 19 Cal.4th 142, 164 [finding substantial evidence the defendant's "judgment was obscured due to passion" where his testimony indicated he panicked and "acted in one continuous, chaotic response to the riotous events outside his door."].)

Moreover, the relevant question is whether the defendant was "under the actual influence of a strong passion *at the time of the homicide*." (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 327, italics added.) Here, the evidence suggested that both defendant and Villanueva departed after the initial confrontation, and there was no evidence that defendant was acting under an intense emotion after he returned to the scene. [3]

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[3] Because we conclude there was insubstantial evidence of any "intense and high-wrought emotions" during the initial confrontation between defendant and Villanueva, we need not address whether any such emotions "had time to cool or subside"

Defendant testified that, when Villanueva "jumped out at him" in the parking lot, defendant felt "surprised" and tried to calm Villanueva down. After the men fought, defendant testified he tried to calm his girlfriend down because nothing had happened. Defendant did *not* testify that he felt any fear or anger.

O'Neal's testimony likewise indicated that defendant did not exhibit any signs of intense emotion when defendant fought with Villanueva behind the dumpster. Defendant took several reasoned, deliberate actions: He stopped fighting with Villanueva after someone shouted, "Estubo," he spoke with Villanueva and shook his hand, and then he walked to his truck to retrieve his gun before shooting Villanueva. In addition, O'Neal's testimony suggests that Villanueva did not perceive defendant to be angry after the two men shook hands: Villanueva did not take any defensive action, but rather returned to his car, took the time to put on his seatbelt, and started to drive away.

Accordingly, the evidence did not show that defendant was acting under an intense emotion that obscured his reason when he shot Villanueva. (Cf. *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1139 [finding substantial evidence the defendant was acting under "the actual influence of extreme emotion" where the defendant testified "he was 'scared' and 'panicking' " when he shot the victim].) As there was no evidence that defendant "actually, subjectively, kill[ed] under the heat of passion" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252), the

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by the time defendant returned to the scene and shot Villanueva. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 164.)

subjective element of the heat of passion theory was not satisfied. Accordingly, the trial court did not err in declining to instruct on voluntary manslaughter. (See, e.g., *People v. Manriquez*, *supra*, 37 Cal.4th at p. 585 [holding the trial court did not err in failing to instruct on voluntary manslaughter where the testimony at trial "contained no indication that defendant's actions reflected any sign of heat of passion at the time he commenced firing his handgun at the victim."].)

2. *Prosecutorial Misconduct*

Defendant contends the prosecutor committed prejudicial misconduct by misstating the law on premeditation and deliberation in closing argument. "Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, 'it is improper for the prosecutor to misstate the law generally [citation] . . . .' [Citations.] To establish such error, bad faith on the prosecutor's part is not required. [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 666–667.)

Here, trial counsel did not object to the alleged misstatement of law in the prosecutor's closing argument. The issue, therefore, is waived. (See *People v. Williams* (1997) 16 Cal.4th 635, 673.) However, because defendant argues counsel provided ineffective assistance by failing to object, we will address the misconduct claim on the merits.

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745–746.) In evaluating trial counsel's actions,

"[a] court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance." (*People v. Dennis* (1998) 17 Cal.4th 468, 541.)

Defendant argues the prosecutor misstated the law in the following remarks:

"So what makes it first degree murder? It's done willfully, deliberately, and with premeditation. That's first degree. . . . That's what defendant's guilty of.

"Willful: You intend to kill.

"Deliberate: You weighed the considerations for and against your choice and knowing the consequences decided to kill.

"Premeditated: You decided to kill before committing the act that causes death.

"Now, the law says the length of time spent considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The cold, calculated decision to kill can be reached quickly. I'll give you an example of . . . willful deliberation and premeditated.

"The world series just ended. Boston Red Sox won. Now, the Angels have a player named Mike Trout. He [was] rookie of the year last year and [had] another good season this year. The reason he's so good, he's good at hitting a ball.

"The pitcher[']s mound is 60 feet, six inches away from home plate and pitchers in the major leagues can throw up to a hundred miles an hour and the pitch comes within [a] tenth of a second. Not even a second. Now, in that short amount of time a batter has to decide, is it a ball or a strike? If it's a strike, am I going to swing? And if he decides to swing, he makes that decision. He makes that decision in a split second. That's willful, deliberate and premeditated.

"And we all make decisions in everyday life. Another example. Let's say you're driving to court for this case. You're running late. You're rushing to make sure you're on time so other jurors don't have to wait for you. So you're driving through the intersection, you're approaching the intersection, the light turns from green to yellow. What do you do? You look -- you make a decision. How far am I away from the intersection? How fast am I going? Are there people around? Is there any police around? Do I hit the brakes or do I hit the gas? In that split second you make that decision. Your decision is willful, deliberate and premeditated."

Defendant contends the prosecutor improperly argued that a premeditated and deliberate decision could be made "in the time in which a driver decides whether or not to drive through a yellow traffic light or in which a batter decides whether or not to swing at a pitch in baseball . . . ." According to defendant, in light of the short amount of time involved in these decisions, a person cannot act with the "substantial pre-existing reflection" required for premeditation and deliberation.

Even if we construe the prosecutor's use of these analogies as misconduct, the record indicates that trial counsel made a reasonable tactical decision not to object. "[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance. [Citations.]" (*People v. Maury* (2003) 30 Cal.4th 342, 419.) Here, defense counsel explained that he "decided that the examples of the yellow light and baseball would not help the prosecution's case and the jury might feel antagonist[ic] towards [him] by raising the objection. Also, the shooter had more time than a split second to get the gun from his truck, come [back] to the victim's car and shoot."

It was reasonable for trial counsel to conclude that the analogies were not prejudicial to defendant because the evidence established that far more time than a split second passed between the time that defendant shook Villanueva's hand and returned to his truck to retrieve his gun.[4] For this reason as well, defendant was not prejudiced by the use of these analogies. (See *Strickland v. Washington* (1984) 466 U.S. 668, 697 ["[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."].)

3. *Firearm Enhancements Under Section 12022.53, Subdivisions (b) and (c) Do Not Apply to Section 246*

With respect to count two—shooting at an occupied motor vehicle (§ 246)—the jury found true the allegations that the defendant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c), and (d). Defendant contends the jury should not have been directed to make findings under subdivisions (b) and (c) because those subdivisions do not apply to violations of section 246. The Attorney General concedes this point, and we agree.

The firearm use enhancements contained in section 12022.53, subdivisions (b) and (c) apply only to the offenses listed in subdivision (a) of that section: Subdivision (b) provides a 10-year enhancement for any person who "personally uses a firearm" "in the commission of a felony *specified in subdivision (a)*," and subdivision (c) provides a 20-year enhancement for any person

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[4] Defendant's counsel, at oral argument, acknowledged that defendant had at least multiple seconds to make the decision to kill.

who "personally and intentionally discharges a firearm" "in the commission of a felony *specified in subdivision (a)*." (§ 12022.53, subds. (b) & (c), italics added.) Section 246 is not one of the offenses enumerated in subdivision (a). (See § 12022.53, subd. (a).)

In contrast, section 12022.53, subdivision (d) applies not only to the enumerated offenses in subdivision (a), but also to violations of section 246. (§ 12022.53, subd. (d) [25-years-to-life enhancement may be imposed on any person who "personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death" "in the commission of a felony specified in subdivision (a) [*or*] Section 246."].)

In conjunction with defendant's conviction of shooting at an occupied motor vehicle in violation of section 246, the jury found true the firearm use allegations under section 12022.53, subdivisions (b), (c), and (d). As we have said, the enhancements under subdivisions (b) and (c) do not apply to violations of section 246, and thus the jury's findings under those provisions should be vacated.

The court's minute order provided that "count 2 is enhanced 25 years to life pursuant to [section] 12022.53(c) . . . ." This was clearly a clerical error as only subdivision (d) of section 12022.53 provides for a 25-years-to-life enhancement. The abstract of judgment also indicated that an enhancement was imposed on count 2 under section 12022.53, subdivision (c). Accordingly, the minute order and abstract of judgment should be amended to state that the enhancement on count 2 was imposed under section 12022.53, subdivision (d).

DISPOSITION

As to count 2, the jury's findings as to the enhancements alleged pursuant to section 12022.53, subdivisions (b) and (c) are vacated. The trial court is directed to amend the January 21, 2014 minute order and the abstract of judgment by making the following correction: Substitute section 12022.53, subdivision (d) in place of section 12022.53, subdivision (c). We therefore modify the judgment and affirm it as modified. We deny the petition for writ of habeas corpus.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.